

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

File No. BPH-911115MG

GARY E. WILLSON

File No. BPH-911115MO

For a Construction Permit  
New FM Station on Channel 265A  
in Calistoga, California

TO: The Honorable Edward Luton  
Administrative Law Judge

RECEIVED

JUL 29 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**RESPONSE TO REQUEST FOR  
PERMISSION TO FILE INTERLOCUTORY APPEAL**

Gary E. Willson as directed by the Presiding Administrative Law Judge files this opposition to the late-filed Request for Permission to File Interlocutory Appeal filed by Moonbeam, Inc. (Moonbeam). Moonbeam seeks permission to file an interlocutory

requirement for grant of an interlocutory appeal by showing in any way that denial of its appeal would require a remand. On the contrary, failure to fully consider the financial issues added against Moonbeam is more likely to result in a remand. Moonbeam simply uses the pretext of a novel question of law to reargue its assertion that it is financially qualified.

It is difficult even to discern the basis for Moonbeam's claim that the MO&O "presents a novel question of law." Moonbeam, it appears, is arguing that since the Bureau reviewed Moonbeam's financial certification as originally presented in its application filed November 15, 1991, and as amended on March 2, 1992, that addition of a financial issue is foreclosed, citing Annax Broadcasting, Inc., 87 FCC2d 483, n. 11 (1981). With all due respect, Moonbeam's argument is baseless. Note 11 of Annax cited by Moonbeam states only that an Administrative Law Judge may not modify hearing issues on grounds already considered in the designation order. In the Revised Processing of Broadcast Applications, 72 FCC2d 202, 216 (1979), the Commission confirmed that consideration of issues subsequent to designation are never foreclosed where new evidence has been discovered or where an issue has not been specifically addressed. The Bureau rarely, if ever, adds financial issues on review of an application, nor can it, because it does not have the benefit of discovery. The issue here was requested and added based on evidence adduced subsequent to designation of the application for hearing and unknown to the Bureau. Specifically, it was discovered that:

- (1) The source of funds was not Alex Brown & Sons, Inc. Banker as specified in the initial application or Mary F. Constant as indicated in the amended application, but Ms. Constant's Abbey & Bianco Retirement Account. See Coastal Broadcasting Partners, 5 FCC Rcd. 734-735 (Rev. Bd. 1990)(remand to determine whether applicant attempted to expand her original financial proposal from sole reliance on the proceeds from the sale of her stamp and coin collection to reliance on all her personal assets).
- (2) Moonbeam claims its amendment was a clarification. This is nowhere mentioned in the amendment and is stated for the first time in its Opposition to the Petition to Enlarge Issues. Indeed, at deposition Ms. Constant demonstrated a total lack of knowledge concerning the purpose and intent of Moonbeam's March 2 amendment. See Ex. 1, pp. 59-62. Mary Constant testified that the financial portion of the application was amended to address confusion on the part of Willson and Willson's counsel. However, that could not be true since no issue about Moonbeam's financial proposal was even raised by Willson until over a year after the amendment had been filed.
- (3) There are no written agreements as required providing funds to Moonbeam, Inc. from Mary Constant or any other source.
- (4) Moonbeam in response to a Request for Documents asserted Mary Constant had no financial statement, then claimed she did in Opposition to Issue Enlargement, but refused to produce the financial statement until ordered to do so. That hand-written financial statement, as detailed more specifically below, is insufficient and shows inadequate available liquid assets.
- (5) Mary Constant was the subject of a substantial tax lien filed by the State of California, which was pending for 4 months until finally paid on April 14, 1993. No showing has been made that sufficient funds were on hand during this period.
- (6) Ms. Constant confirmed in her opposition to the Request for Issue Enlargement that the Abbie and Bianco Retirement Fund on which she relies for funding is a retirement account. As such, it appears that it may well be subject to taxation which would reduce the amount available to below the \$95,000 required to construct and operate the station for 3 months. The U.S. Tax Code provides for 10 percent penalty for early disbursement of retirement funds. The funds would then be subject to federal taxes at a rate of up to 33

percent. In addition, other taxes would likely be due, such as California personal income taxes up to 11 percent. See California Revenue and Tax Code, 17041. This would leave a remaining balance of \$91,619 -- less than the already low amount Moonbeam estimates it will cost to construct and operate the station.

The Bureau was unaware of any of these factors. Moonbeam's assertion, therefore, that the Bureau had already definitively ruled on Moonbeam's financial qualification is unsupported as a matter of law and fact. In any event, the issue is hardly new or novel.

Moonbeam misuses its request to file an appeal as a vehicle for rearguing the merits of adding the financial issues. By avoiding proper procedures for resolution of the added issues, either through a motion for summary decision, or a hearing, Moonbeam is attempting to avoid full discovery upon the issues. Even absent additional discovery, it is readily apparent from the facts available that there are substantial and material questions concerning Moonbeam's financial qualifications. In this regard, Willson makes the following observations:

- (1) Ms. Constant's hand-written balance sheet, dated August 30, 1991 is inaccurate. At that time, Ms. Constant had pending another application for a station in Idaho in which she had committed to provide funding in the amount of \$125,000. See Ex. 2. Her financial commitments to both stations as of August 30, 1991 and as of the time the application was filed exceeded the net liquid assets Ms. Constant claims were available. (The \$125,000 for Eagle and \$95,000 for Calistoga exceeds by \$67,000 the net liquid assets of \$153,000 Ms. Constant claims was available.) The Review Board has recently noted,

The Commission has previously held that broadcast applicants with multiple applications pending before the Commission must be able to demonstrate adequate financial resources to construct and operate all proposed facilities. See e.g., Texas Communications Limited Partnership, 5 FCC Rcd. 5876, 5878, ¶11 (Rev. Bd. 1990), and cases cited therein (subsequent history omitted).

Breeze Broadcasting Company, 8 FCC Rcd. 1835 (Rev. Bd. released March 18, 1993). See also Isis Broadcasting Group, 7 FCC Rcd. 5125 at n. 38 (Rev. Bd. August 13, 1992). The burden is on the applicant to demonstrate that it was financially qualified at the time the application was filed. Aspen FM, Inc., 6 FCC Rcd. 1602, 1603 ¶9 (1991).<sup>1</sup>

- (2) Moonbeam has also provided a woefully inadequate business plan. The three-page handwritten business plan is undated and there is no way to know whether it was prepared before or after the application was filed. Far more importantly, however, it fails to adequately estimate the cost of building and operating the station, a fundamental criteria in determining whether an applicant is financially qualified. Moonbeam has omitted significant cost items. Ms. Constant testified at hearing that she proposes to locate her main studio in Calistoga and an auxiliary studio in Santa Rosa. This was an effort to explain her deposition testimony that the studio would be located in Santa Rosa which conflicted with her application claiming the main studio will be located within the 3.16 mV contour of the proposed station. The business plan provides for the cost of constructing one studio, not two. Neither studio will be at the transmitter site, but no provision is made for delivery of the signal from the studio to the transmitter either via an STL or phone lines.

studios nor is any provision made for remodeling space to serve as the station's studio. There is also no provision for the cost of installing equipment or for the cost of power. See Northampton Media Associates, 4 FCC Rcd. 5517 (1989)(an applicant with a financial issue must adduce probative evidence that it engaged in "serious and reasonable efforts to ascertain predictable construction and operating costs"). See also Emission de Radio Balmeseda, 7 FCC Rcd. 3852, 3858 ¶35 (1992)(financial issue designated where budget described as "just scratch" and purported discussion about budget with engineer described as "just talking").

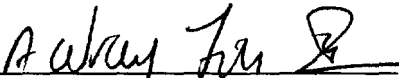
- (3) The balance sheet for the Calistoga application is also woefully inadequate. FCC Form 301 requires applicants to prepare financial statements, "in accordance with generally accepted accounting principals." FCC Form 301, p. 5. FCC Form 301 also requires that for each person who has agreed to furnish funds there must be a balance sheet or financial statement showing "all liabilities and current and liquid assets sufficient to meet current liabilities." FCC Form 301, p. 7. Many

avoid an even more costly and time-consuming remand on financial qualification -- an issue of great concern to the Commission.

Respectfully submitted,

GARY E. WILLSON

GAMMON & GRANGE  
8280 Greensboro Drive  
Seventh Floor  
McLean, VA 22102-3807  
(703) 761-5000

By   
A. Wray Fitch III  
His Attorney

July 29, 1993

[0068/C93awf0pReq]

**EXHIBIT 1**



# ORIGINAL

1

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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:   
IN RE: APPLICATIONS OF : Docket No. MM93-42  
MOONBEAM, INC. : File No. BPH-911115MG  
GARY E. WILLSON : File No. BPH-911115MO  
:   
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McLean, Virginia

Friday, June 4, 1993

Deposition of MARY CONSTANT, called for examination by  
counsel for Gary Willson, pursuant to notice, at the offices  
of A. Wray Fitch, Esq., Gammon & Grange, 8280 Greensboro  
Drive, Seventh Floor, McLean, Virginia 22102-3807, before  
Barbara E. Ingle, a Registered Professional Reporter and  
notary public in and for the State of Virginia, beginning at  
9:30 a.m., when were present on behalf of the respective  
parties:

1 BY MR. FITCH:

2 Q Do you recall amending it in any way?

3 A My application?

4 Q Your application as it relates to your finances, or  
5 to be more precise, by you I'm referring to your corporate  
6 entity Moonbeam.

7 A I don't think I did. Is it in the application that  
8 it's amended? Do you have something you can show me?

9 MR. SHUBERT: Why don't we show her the amendment  
10 so she understands what you're talking about.

11 MR. FITCH: Okay. Let's refer then to page 6 --

12 MR. SHUBERT: Of the original?

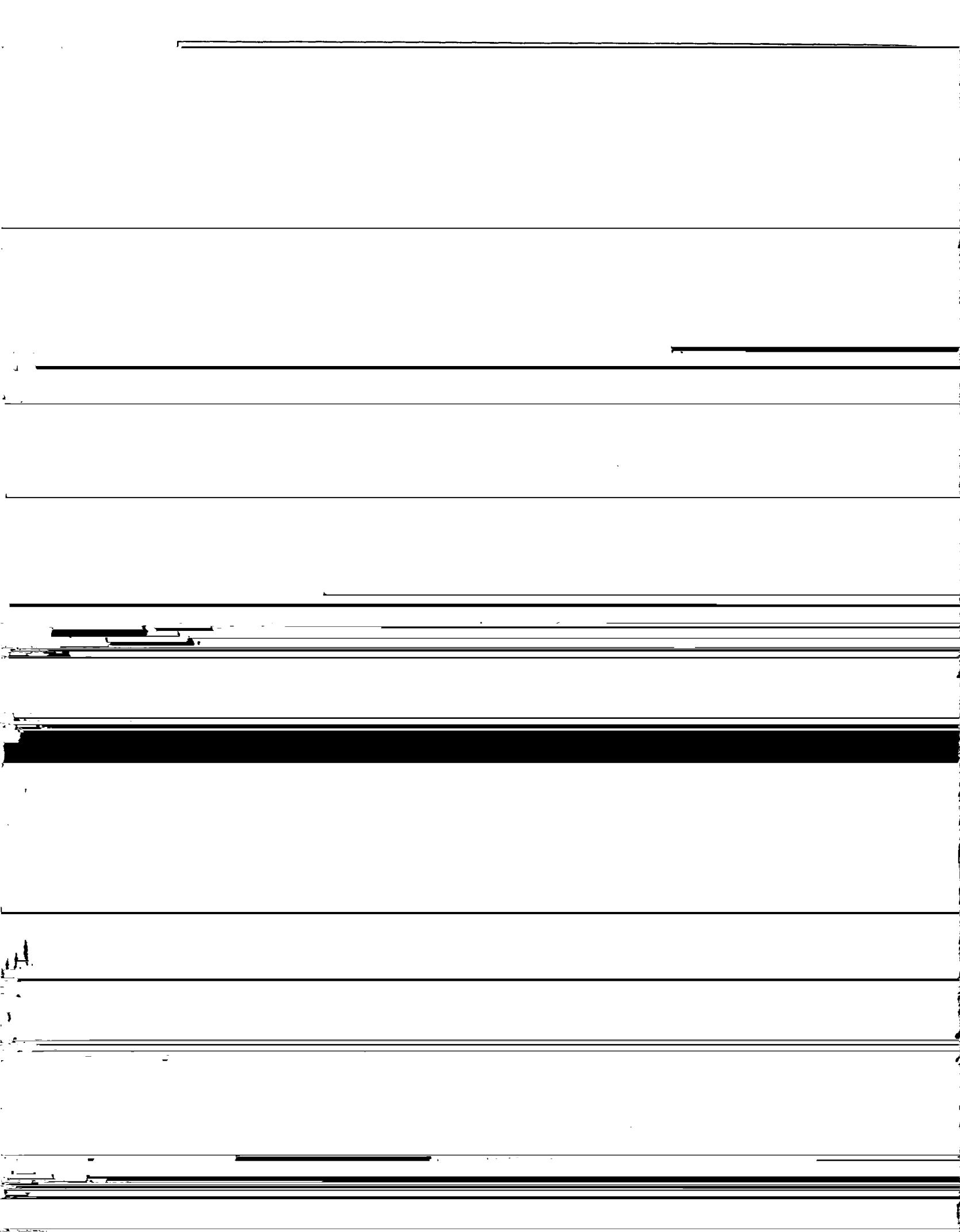
13 MR. FITCH: -- of the amended application or the  
14 amendment that was filed on March 2nd.

15 MR. SHUBERT: Let the record reflect that I'm  
16 placing before the witness page 6 of FCC Form 301 that is  
17 contained in an amendment filed March 2nd, 1992. It bears a  
18 caption at the top of the upper right-hand corner of the page  
19 Moonbeam Inc. Amendment, February 1992.

20 BY MR. FITCH:

21 Q Do you know how this amendment changes your  
22 original application?

23 A I'd have to look at the original application.



1 changed; is that correct?

2 A I think the amendment was filed because of a  
3 confusion on your part.

4 Q On my part? What confusion are --

5 A I think the confusion was as to actually who Alex  
6 Brown and Son were. I guess you were not aware of the fact  
7 that it's a stock brokerage firm and that they often hold  
8 funds, cash as well as stocks and bonds for people. And so  
9 when I put Alex Brown and Son as source of funds, I only  
10 meant they were holding those funds for me.

11 Q Now, this amendment was filed in March, is that  
12 correct, of '92?

13 A February 1992.

14 MR. SHUBERT: Well, it was filed --

15 A Oh, it was filed March 2nd. You're right.

16 BY MR. FITCH:

17 Q At that point in time in March or February of '92  
18 where did this confusion arise? I mean was it confusion in  
19 your own mind, or who was it that was --

20 A There was actually no confusion in my mind.

21 Q Who was it, then, that directed or decided that the  
22 application should be amended?

23 A I think it was because of a confusion arising on

1 your client's part as to what Alex Brown and Son was.

2 Q All right. Now, let's talk about that.

3 A I mean he could have been confused if I said Bank  
4 of America, but it happened to have been Alex Brown and Son.

5 Q All right. Let's talk about that. In March of '92  
6 what was it that led you to believe that there was confusion  
7 about this on the part of Gary Willson or myself or anyone  
8 else?

9 A It was probably a conversation with my attorney  
10 discussing your confusion.

**EXHIBIT 2**

**DUPLICATE**

FCC/MELLON MAY 16 1991

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**HALEY, BADER & POTTS**

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LARRY D. SUMMERVILLE  
BROADCAST ANALYST

ANDREW G. HALEY  
(1904-1966)

May 16, 1991

**DUPLICATE COPY**

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Application of Moonbeam,  
Inc. for a New  
Class C2 FM Station  
at Eagle, Idaho

Dear Donna:

On behalf of Moonbeam, Inc., applicant for the above-referenced facility please find enclosed an original and two copies of the above-referenced application for a new Class C2 FM station on Channel 300 at Eagle, Idaho. Also enclosed is the required \$2,030 filing fee along with FCC Form 155.

Should you have any questions regarding this matter please contact this office directly.

Very truly yours,

  
Richard M. Riehl

RMR:jn

Enclosures

APPLICATION FOR CONSTRUCTION PERMIT FOR COMMERCIAL BROADCAST STATION

For COMMISSION Fee Use Only	FEE NO:	For APPLICANT Fee Use Only
	FEE TYPE	Is a fee submitted with this application? <input type="checkbox"/> Yes <input type="checkbox"/> No
	FEE AMT:	If fee exempt (see 47 C.F.R. Section 1.1112), indicate reason therefor (check one box): <input type="checkbox"/> Noncommercial educational licensee <input type="checkbox"/> Governmental entity
	ID SEQ:	FOR COMMISSION USE ONLY FILE NO. <u>BPH-910516mll</u>

Section I - GENERAL INFORMATION

1 Name of Applicant  Moonbeam, Inc.			Send notices and communications to the following person at the address below: Name Mary F. Constant * Moonbeam, Inc.		
Street Address or P.O. Box P.O. Box 526			Street Address or P.O. Box P.O. Box 526		
City Nicasio	State CA	ZIP Code 94946	City Nicasio	State CA	ZIP Code 94946
Telephone No. (Include Area Code) (415) 662-2226			Telephone No. (Include Area Code) (415) 662-2226		

2 This application is for: ☐ AM ☒ FM ☐ TV

(a) Channel No. or Frequency FM Channel 300	(b) Principal Community Eagle	City	State
		ID	

(c) Check one of the following boxes:

☒ Application for NEW station

☐ MAJOR change in licensed facilities call sign:



NOTE: If this application is for a change in an operating facility do not fill out this section.

- ☒ Yes ☐ No

\$ 125,000

FCC 301 (Page 6)  
June 1989

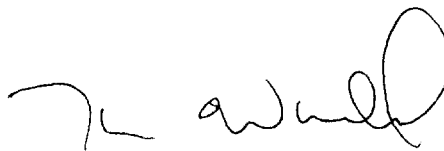
CERTIFICATE OF SERVICE

I, Tim Wineland, in the law offices of Gammon & Grange, hereby certify that I have sent, this 29th day of July 1993, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing RESPONSE TO REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL to the following:

\* The Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 225  
Washington, D.C. 20554

Robert Zauner, Esq.  
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---

Tim Wineland

\* Hand Delivery